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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. ——

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

ENGINEERS PUBLIC SERVICE COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, entered November 22, 1943, which reversed and remanded orders entered by the Commission on September 16 and October 6, 1942.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 1209–1231) is not yet reported. The opinions of the Commission (R. 78–165) are thus far reported only in the Commission's Holding Company Act Releases Nos. 3796 and 3835.

JURISDICTION

The judgment of the Court of Appeals was entered November 22, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79x (a)).

QUESTIONS PRESENTED

1. Did the Commission properly order respondent Engineers,[1] under the "other business" clauses of Section 11 (b) (1) of the Public Utility Holding Company Act of 1935 (15 U. S. C. § 79k (b) (1)), to divest itself of its interest in the transportation properties owned and operated by its subsidiary Virginia.

2. Was it permissible for the Commission's order to designate the single integrated public-utility system permitted to be retained, in default of any alternative designation by Engineers itself?

STATUTE INVOLVED

Section 11 (b) (1) of the Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803 (15 U. S. C. § 79k (b) (1)) provides as follows:

[1] The Public Utility Holding Company Act of 1935 will be referred to as the "Act," Engineers Public Service Company as "Engineers," Virginia Electric and Power Company as "Virginia," El Paso Electric Company as "El Paso," and Gulf States Utilities Company as "Gulf." All these companies are respondents here and the last three are subsidiaries of Engineers.

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It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region

affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) * * *

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

Section 11 (c) (15 U. S. C. 79k (c)) provides:

Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not

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exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 24 (a) (15 U. S. C. 79x (a)) provides:

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

STATEMENT

This case came before the Court of Appeals on a petition filed by Engineers and certain of its subsidiaries (R. 49–77), under Section 24 (a) of the Act, to review two orders of the Commission under Section 11 (b) (1) requiring the divestment of certain properties and interests (R. 78–165). In substance Section 11 (b) (1) makes it the duty of the Commission to require each registered holding company to take such action as the Commission finds necessary to limit the operations of its holding-company system to a single integrated public-utility system (as that

term is defined in Section 2 (a) (29) (15 U. S. C. § 79b (a) (29)), together with such additional integrated public-utility systems and such other businesses as meet the standards specified in Section 11 (b) (1). The court's opinion, insofar as it is unfavorable to the Commission, involves particularly the "other business" clauses of that section.

There are no factual disputes. Engineers is a registered public-utility holding company pursuant to Section 5 of the Act (15 U. S. C. § 79e). It controls and operates gas and electric utility companies serving twelve states in widely scattered sections of the country. The companies which it controls and operates are engaged also in various nonutility businesses[2] in fourteen states as well as Canada and Mexico. The two most important of these subsidiary companies are Virginia, which carries on an electric utility business in Virginia and North Carolina and gas utility, street railway, bus and ice businesses in Virginia; and Gulf, which carries on electric and gas utility, steam, water and ice businesses in Texas and Louisiana.

Hearings were held by the Commission under Section 11 (b) (1), and the Commission granted the request of Engineers for advisory findings

[2] Section 2 (a) (5) of the Act (15 U. S. C. § 79b (a) (5), defines a "public-utility company" to mean only an electric or gas utility company.

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as to which properties were retainable on the assumption that the electric system of Virginia would be retained and on the alternative assumption that the electric system of Gulf would be retained. On September 16, 1942, the Commission found that only the electric utility system of Virginia (together with its electric appliance merchandising and jobbing business and its ice business) could be retained. The Commission accordingly ordered the divestment of all the other holdings of Engineers. (R. 160.) The order permitted Engineers to petition for leave, within fifteen days, to retain Gulf's electric utility system instead of that of Virginia, and the findings and opinion indicated the properties which could be retained and which would have to be divested under the Act in that event. (R. 161.)

This is the first of the two orders which were under review in the court below. The second order (R. 163–165), entered October 6, 1942, denied a petition for rehearing and for a stay, except that another fifteen-day period was granted Engineers in which to petition for leave to retain the electric utility system of Gulf instead of that of Virginia. No such petition for the retention of Gulf was filed.

The court held that the Commission had erred in ordering Engineers to divest itself of the transportation properties of Virginia under the "other

business" clauses of Section 11 (b) (1).[4] The Commission's position, that under the standards of Section 11 (b) (1) the retention of a non-utility business ought not to be permitted unless it is related to the operations of a retainable utility system in such a manner as to aid those utility operations, was rejected. It was apparently undisputed that, if the Commission properly construed the statutory standards, the transportation businesses could not be retained. The company contended and the court held, however, that no relation to the operations of a retainable utility property need be shown. The Congressional intention, the court stated, was "to forbid the divestment of other businesses, not detrimental to

[4] As stated before, Virginia, in addition to its electric utility business in Virginia and North Carolina, carries on gas utility, street railway, bus and ice businesses in Virginia. The court stated that a similar ruling would be required if it were to pass on the Commission's findings in regard to the other businesses which Gulf and El Paso, respectively, could retain. Gulf carries on a steam and water business in Texas and Louisiana and an ice business in Texas. El Paso is a Delaware corporation which is itself a registered holding company and which controls through stock ownership two other companies (a Texas company of the same name and El Paso and Juarez Traction Company) operating or owning electric utility, transportation and toll bridge properties in Texas, New Mexico and Mexico. Since El Paso is a registered holding company, a separate provision of the Commission's order was directed to that company, limiting its operations to the electric utility system and the appliance business of its subsidiary, El Paso of Texas, and requiring it to divest itself of the transportation and toll bridge businesses of both its subsidiaries. (R. 161).

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the functioning of the principal system, if retention will serve the interests of the general public or the interests of investors or consumers, irrespective of the functional relationship between these businesses and the principal system" (R. 1223).

This holding constituted the primary basis for reversing and remanding the case. The court intimated also that Engineers must be given a further right to designate the system to be retained. The other issues raised by respondents, including both constitutional and statutory construction questions, were decided favorably to the Commission.

REASONS FOR GRANTING THE WRIT

1. In holding that the Commission misinterpreted the "other businesses" clauses of Section 11 (b) (1) of the Act the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *North American Company* v. *Securities and Exchange Commission*, 133 F. (2d) 148, certiorari granted on a petition raising constitutionality only, No. 6, present Term. The Circuit Court of Appeals there sustained the position of the Commission, the same as that taken in the present proceedings, stating (133 F. (2d) at 152–153):

> The Commission interpreted these "other business" clauses to permit retention only

when it affirmatively appears "that the public interest will be furthered by retention of a nonutility interest by reason of its relation 'to economy of management and operation' of a public-utility system or systems or 'the integration and coordination of related operating properties.'" This conclusion is consonant with the policy of the Act expressed in section 1 (b) (4), 15 U. S. C. A. § 79a (b) (4) which declares that "the national public interest" is or may be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties." We agree with the Commission's interpretation. It is apparently not disputed that the three other businesses are unrelated to the operations of the St. Louis system. Consequently no error appears in ordering their divestment.

In the *North American* case the Commission refused to permit the retention of a securities company, a land and development company formed to acquire land for a hydro-electric plant, and a coal company; retention was permitted of a steam heating business augmenting the utility's heating service, a coal company 80 percent of whose output was used by the utility, and a short railway freight line so long as it continued to be used primarily for hauling such coal. The Commission expressly declined to give dominant weight to such factors as the historical associa-

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tion of the properties, their profitability, or the possible realization of losses on their disposition; their relation to the operations of the utility system was deemed controlling. Application of the same standards in the present case led to the exclusion of a gas appliance business and a transportation company, and authority to retain an ice business which serves the utility's building for heating and cooling purposes and an electrical appliance merchandising and jobbing business.

The court below, acknowledging the identity of the Commission's views in this and the *North American* cases (R. 1222–1223), necessarily rejected the holding in the Second Circuit.

The question is one of public importance in the administration of section 11 (b) (1), since it is a basic question of interpretation which will recur in the many pending and future integration cases under that section. Over 20 proceedings under section 11 (b) (1) are now pending before the Commission.

The Commission's interpretation, as approved in the *North American* case, gives effect to the general purpose of the section to integrate each holding-company system and to take it out of nonutility businesses which bear no relation to the operations of a retainable public-utility system. The first "other business" clause specifies in terms that the nonutility businesses sought to be retained shall be reasonably incidental or economically necessary or appropriate "to the operations

of such integrated public-utility system." The second "other business" clause likewise specifies that the Commission may permit as reasonably incidental or economically necessary or appropriate "to the operations of one or more integrated public-utility systems" the retention of an interest in any nonutility business which it finds "necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems." The court below, denying the Commission's authority to give emphasis to the presence or absence of functional relationship between the properties, rested its decision exclusively on the standards set forth in the latter portion of the second clause.[4] These standards, how-

[4] The court below erroneously concluded that the Commission's construction was inconsistent with the legislative history. Senator Wheeler stated that the purpose of the legislation in this respect was "to require utility holding companies to get out of the myriad of speculative nonutility adventures in which they have been promiscuously active in the past." 79 Cong. Rec. 10847. This was said in criticizing the House-approved bill, which provided: "The Commission shall not * * * require any company to divest itself of any interest in or control over (1) persons or property other than a public-utility company or the utility assets of a public-utility company *unless the Commission finds that such interest or control may not be retained consistently with the public interest* * * *." S. 2796, Section 11 (b), Union Calendar No. 451, accompanied by H. Rep. No. 1318, 74th Cong., 1st Sess. (1935), at p. 17. Senator Wheeler supported the final bill, which substituted the standard of relation to the operations of retainable integrated utility properties. The then Chairman of the Commission likewise objected to the

ever, are properly read by the Commission in the context of section 11 (b) (1) itself and of the Act as a whole, and not abstractly, as the opinion below would seem to require. Cf. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24–25. Under section 11 (b) (1) even additional public-utility systems are ruled out by the strict standards of the so-called (A)–(B)–(C) clauses unless they bear a close relation to the operations of the retainable utility system. With respect to "other businesses" the ultimate finding which the Commission must make to justify retention under section 11 (b) (1) is that they are "reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems." Moreover, in section 1 (c) Congress declared it to be "the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section," and in section 1 (b) (4) it is declared that the national public interest

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House-approved bill on the ground that it furnished "no effective standard to guide the Commission." Letter from Joseph P. Kennedy to Senator Wheeler, quoted at 79 Cong. Rec. 10838. In the Senate, an amendment sponsored by Senator Minton permitted the retention of business affected with a public interest whose rates were regulated by law, where the retention was not detrimental to the proper functioning of an integrated public-utility system. 79 Cong. Rec. 8849. The conferees, including Senator Wheeler, rejected both versions and substituted the last sentence of the present section 11 (b) (1).

and the interest of investors and consumers are or may be adversely affected "when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties."

The Commission's interpretation is not only in harmony with the objectives of the legislation, but is relatively definite in application, in contrast to the vaguer concept imposed by the decision below. For that reason review of the decision is of additional importance to the administration of section 11 of the Act.

2. On the question whether the Commission was justified in designating the single integrated utility system, in default of an alternative designation by Engineers after an opportunity to do so, the decision below also appears to be in conflict with that in the *North American* case.

The Commission, without deciding whether the choice of systems lay with Engineers as a matter of right (R. 82n), gave Engineers the privilege of making the initial choice. It was only after Engineers announced that it was not yet ready to make the selection that the Commission, by its first order under review, selected Virginia as the single integrated system, but granted Engineers permission to ask within fifteen days for leave to substitute Gulf, and made alternate findings as to the properties which might be retained in that

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event. When Engineers failed to make the choice after this period, plus an additional fifteen-day period granted in the Commission's second order under review, the Commission's selection of Virginia as the principal system became final. On review Engineers contended that it had been given no suitable opportunity to make a choice.

The same contention had been rejected by the Second Circuit in the *North American* case, in the following well-considered terms (133 F. (2d) at 151):

> Where, as in this case, there are found to be several integrated public utility systems, any one of which might reasonably be chosen as the principal system, is the choice to be made by the holding company or by the Commission? We may assume, without so deciding, that the privilege of selecting its principal system should, during preliminary stages of the section 11 (b) (1) proceeding, be accorded the holding company. This was done and only after North American had refused to express a preference between the several integrated public utility systems, was the St. Louis system selected by the Commission as the principal system for retention. No contention is made that the Commission made an unreasonable selection or that the selection of a different system would be more beneficial to North American. Its argument is merely that it cannot now tell which two of the three systems (St. Louis, Cleveland

and Wisconsin) will be most marketable; that Section 11 (c) gives it at least one year for compliance with the divestment order; and therefore it may select its principal system at any time within the period allowed for compliance. We do not think the statute contemplates such deferment of selection. It would necessarily result in delays. The Commission's duty is to act under section 11 (b) "as soon as practicable," and due diligence in complying with the order is prescribed by section 11 (c). Nor do we see that deferment in selecting the principal system is necessary to adequate protection of a holding company against circumstances which may arise during the period allowed for compliance with the order. If changes occur in "the conditions upon which the order was predicated," the Commission is authorized by subsection (b) to revoke or modify any order previously made thereunder. Under the circumstances disclosed by this record we see no error in the Commission's selection of the St. Louis system as the principal system for retention.

It is not clear in precisely what respect the decision below disapproves the procedure followed by the Commission. The Commission in fact gave Engineers the privilege of making the initial selection, and made preliminary rulings to enable the company to exercise that privilege, making the designation itself only when the company failed to do so within a period which the Commission

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regarded as reasonable. Section 11 (c) provides that any order under subsection (b) shall be complied with within one year from its date, unless the Commission for good cause shown extends the time. There is language in the opinion below indicating approval of the contention of Engineers that it is entitled to exercise a right of selection at any time within a year. To grant such a right, as the Second Circuit pointed out, would necessarily lead to delays and would not be compatible with the mandate of due diligence and the duty of the Commission to proceed under section 11 (b) "as soon as practicable." If the absolute right so claimed was not meant to be granted by the court below, no reason appears why the Commission's procedure with respect to the designation of a system should not have been held to be well within the range of administrative management of such matters. Cf. *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

Furthermore, no reason appears why, in any event, those substantial portions of the Commission's order which the court below upheld or which were not challenged by Engineers should not have been affirmed,[8] without the necessity of

[8] Those portions of the order include the directions for divestiture of the electric and gas utility systems of Gulf and El Paso and the gas system of Virginia (as to which the court held the Commission had ruled properly), and the electric and transportation properties of Savannah Electric and Power Co., another subsidiary of Engineers (as to which Engineers pressed no objection in the court below).

entering a new administrative order from which a new minimum period of a year for compliance would presumably begin to run. From every point of view, therefore, the decision below results in unwarranted delay in the performance of the duties imposed on the utility and the Commission by section 11 (b) (1).

3. Review herein is of especial importance because proceedings to set aside the Commission's orders may in any case be brought in the District of Columbia, in addition to the circuit wherein the aggrieved person resides or has his principal place of business. (Section 24 (a).)

Should respondent request review of the questions of constitutionality and statutory construction decided favorably to the Commission, we shall join in the request, in recognition of the public importance of the issues.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

MILTON V. FREEMAN,
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